

CRIMINAL APPEAL NO. 1446 OF 1984.

Date of decision: 16.3.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. K.P. Raval, A.P.P. for appellant-State,
Mr. S.R. Patel, advocate for respondent Nos.1 and 2.
Mr. Adil Mehta, advocate, appointed by Court for
respondent No.3.

1. Whether Reporters of Local Papers may be allowed
to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy
of judgment?
4. Whether this case involves a substantial question
of law as to the interpretation of the
Constitution of India, 1950 or any order made
thereunder?
5. Whether it is to be circulated to the Civil
Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

March 16, 1996.

Oral judgment (Per Jain, J.)

1. This appeal by State against acquittal arise from
Sessions Case No.45 of 1984 on the file of learned
Additional Sessions Judge, Baroda, wherein three
respondents/ original accused were charged for commission

of offence punishable under Sections 307, 326 and 333 read with Section 34 of Indian Penal Code. Vide judgment dated 27.9.1984 all the accused were acquitted and, therefore, the State has preferred this appeal.

2. Briefly stated the facts of this case are as under:

3. That on 10.12.1982 at about 7.40 P.M. when the victim, Head Constable, Umaji Sidashiv, was passing through Pratapnagar Railway Yard, Broad Gauge, Water Pump, was suddenly attacked by the respondents. At the relevant time, respondent No.1, Bhima Ishwar, was armed with scythe, respondent No.2, Lalo alias Vijay Devkinandan and respondent No.3, Pravin Gambharbhai Solanki, were armed with sticks. As alleged, having nursed common intention to cause death or to cause grievous hurt, all the accused/respondents jointly attacked and assaulted, as a result of which injured/victim Umaji Sadashiv sustained fractures and was to admit in hospital as indoor patient. In this background that a complaint came to be filed and the investigation was set in motion.

4. In this case, respondents No.1 and 2 have been represented by learned advocate, Mr. S.R. Patel whereas despite service of process, respondent No.3 did not engage any lawyer. Mr. Adil Mehta, learned advocate was requested to appear and assist the Court. Mr. Mehta readily accepted the Court's request and appeared on behalf of respondent No.3, who was undefended.

5. On perusal of evidence, it appears that this is a case wherein the incident is alleged to have been seen by independent eye witnesses. The prosecution has also relied upon the evidence of injured eye witness. The prosecution has led evidence of P.W.3, Krishnaben Shivajirao, Ex.19 and P.W.5, Manoj Bapu Rane, Ex.24, as eye witnesses and the injured Head Constable has been examined as P.W.4, Ex.22. The FIR which set the investigation in motion is placed at Ex.23. FIR is given in hospital by the injured himself.

6. Before we discuss merits of this appeal, we are conscious about the cardinal rule that while dealing with acquittal appeal if it is found that the view taken by the learned Judge is manifestly erroneous and the conclusions drawn are wholly unreasonable and perverse then only interference is called for. Otherwise, if on facts, two views are possible and the learned Judge has taken one view, the order of acquittal be not interfered

and benefit must go to the accused. Therefore, the questions arising for our consideration would be:

- (i) Whether looking to the evidence two views are possible, and
- (ii) if not, whether the view taken by the learned Judge is in consonance with the evidence and whether is reasonable and not perverse and is without any manifest error.

7. As observed in the preamble of this judgment that the prosecution has relied upon evidence of eye witnesses wherein one of the witnesses is injured. As regards the evidential value of injured witness is concerned, our attention is drawn to a recent decision of the Supreme Court in the case of Bonkya v. State of Maharashtra, (1995) 6 SCC 447, wherein it has been held that the injured witnesses are stamped witnesses whose presence admits of no doubt and being themselves the victims they would not leave real assailants and substitute them with innocent persons. In this view of fact, the evidence of injured witness has great force in law and has not to be appreciated at par with other witnesses.

8. Coming to the evidence of P.W.3, an eye witness, at the outset we say that her presence is natural and cannot be doubted and, therefore, her evidence would be material specially when her presence was not challenged in cross-examination. She has stated that on the relevant day and time when she was sitting inside her house, she saw three persons passing therefrom armed with sticks and scythe. She has identified said persons as the accused present in court. She saw them proceeding towards railway station. On hearing commotion she came out and saw all these three persons assaulting Umaji Sadashiv. Thereupon she alongwith the wife of injured Umaji and other witness went to the site of incident where the victim was seen injured and bleeding. She has been cross-examined at length on behalf of the respondents but has not been shaken and has adhered to her version as stated in examination-in-chief. Even the suggestion that she did not see the respondents assaulting Umaji has also been categorically turned down. The only suggestion made to shake the veracity of her testimony is that she is giving false deposition since the injured is a man of police force and her husband is also a member of police force. In our view, in absence of any other evidence, which can shake the credibility and trustworthiness of this witness, this suggestion has no force and cannot affect reliability of her testimony. Similarly, P.W.5 has also been examined as another eye witness, P.W.5, Manoj Bapu Rane, is, no doubt, related to

the injured and is the maternal uncle of this witness. As per his testimony, at the relevant time he was prosecuting his studies at the residence of his maternal uncle, i.e., injured Umaji Sadashiv. He further says that he heard shouts of his maternal uncle, crying for help and, therefore, immediately he alongwith his sister, his maternal aunt (wife of injured), and Krishnaben from neighbourhood came out and rushed towards the railway yard. While rushing towards the yard they saw respondents/accused assaulting the injured. This witness also is very certain and precise about the nature of weapons used by the respondents. He says that at the relevant time respondent No.1, Bhima Ishwar was armed with scythe, respondent No.2, Lalo alias Vijay Devkinandan, was holding stick (embedded with iron rings) and respondent No.3, Pravin Gambhirbhai Solanki, was armed with simple stick, and all were jointly assaulting injured Umaji. According to this witness, during assault the injured also received blows on head, back, arms and legs and as a result of that the injured was also bleeding. He has also identified muddamal articles 1, 2, and 3, the clothes which were put on by the injured at the time of incident. Similarly, he has also identified muddamal articles 4, 5 and 6, as the arms possessed and used by the respondents/accused at for assaulting the injured. From the tenor of cross-examination of this witness, it transpires that injuries received by the injured are not challenged. However, it transpires that the endeavour of respondents is to suggest that the injuries have been received by mere fall on a heap of coal and the accused have been falsely implicated. A minor contradiction is also sought to be brought with regard to number of blows given at a particular region of the body. Of course, in the examination-in-chief he has stated that all the accused were simultaneously inflicting blows with arms held by them whereas in the police statement the witness had said that two stick blows were given on head. In our view, this is a minor contradiction and cannot affect the prosecution case as the fact remains that the injured was beaten with sticks on various parts of the body, including that of head. The witness categorically stated that the injured was given blow on head, back, arms and legs. Except this, we do not find any evidence sought to be brought in cross-examination going against the case of prosecution. The contradiction does not go to the root of merits but pertains to the process of commission and hence is not material and cannot be looked into.

9. The next witness is the injured himself. Injured Head Constable, Umaji Sadashiv Naik, has been examined as

P.W.4 at Ex.22. The FIR Ex.23 was lodged by this witness and we find that the oral testimony as well as the FIR corroborate each other. In paragraph 2 of his testimony, while referring to the motive, he has stated that he had informed the concerned police station about the involvement of respondents in business of illicit liquor and, therefore, a raid was carried at their residence. Thus, having come to know that the injured was the informant the respondents/accused nursed grudge and thought to take revenge. In this background when he was returning from railway yard he was attacked by the respondents. The fact of raid is not disputed by respondents and, therefore, the motive impliedly goes unchallenged. In paragraph 3 of his testimony he states that respondent No.1 was having scythe, respondent No.2 was armed with stick (embedded with iron rings) and respondent No.3 was armed with simple stick. Before attacking, respondents No.1 and 2 threatened him as to why he informed police about business of illicit liquor as they have been adversely affected and are forced to close their business. With this utterance, accused started assaulting him. On receiving first unbearable blow on head, he just saw down and in the meanwhile respondent No.1 assaulted with reverse side (blunt edge) of scythe and gave blow on right arm. Similarly, respondent No.3 also gave stick blows on right thigh. However, on hearing his cries for help, his wife and two other witnesses i.e., P.W.3 and P.W.5 came there. Similarly, on hearing his shouts for help two police constables, who were also on duty in nearby area came there in the meanwhile on seeing them the accused had made their escape good. He further states that Head Constable Amrut Damu and and Police Constable Gajendra came there and took him to hospital where he was initially treated as indoor patient for two days from 10th to 12th December 1982 and then for six days from 24th December 1982 to 30th December 1982 and thereafter the treatment was continued for six months as outdoor patient. This witness has also stood by the grilling test of cross-examination without being shaken on material points i.e., occurrence and involvement of accused. From the tenor of the cross-examination it is evident that injuries received by him are not challenged nor the incident is also challenged. However, a suggestion of false implication is only made. The fact that this witness had informed the police department about respondents carrying out business of illicit liquor, consequent raid and closure of business has also been admitted. It is in this background that a suggestion is made that though he had complained against respondents nothing incriminating was found during raid

and the witness was afraid about retaliation hence as preventive measure has falsely implicated them.

10. In the background of this evidence, we find that the evidence of all the witnesses including the injured witness is consistent as regards the time, place and actual occurrence. The evidence is also consistent about the use of weapons by individual respondent. The evidence also corroborates the information, Ex.23, given to the police on the basis of which the investigation was commenced. Simply because P.W.5 is a near relative and P.W.3 a neighbour of the injured, their evidence cannot be discarded or thrown away as otherwise their evidence is reliable, trustworthy and is coming in natural course. Presence of the eye witnesses, P.W.3 and P.W.5, is not seriously challenged and is in natural course. Secondly, we have no reason to disbelieve the evidence of injured witness as no previous enmity is alleged except that the injured giving information of illicit liquor business done by the accused. It is true that on the basis of the information given by this injured, raid was carried out and nothing incriminating was found. However, as a result of the raid, the respondents' interest was adversely affected and resulted in closure of their business. Argument about false implication is not palatable merely because on the strength of the information the raid carried was not successful, and therefore, the injured nursed grudge and falsely implicated the accused in this case. On the contrary, material on record is sufficient to establish their motive. That the information given by the injured resulted into closure of their business and thereby the respondents were at monetary loss and, therefore, with a view to take revenge they assaulted and caused injuries. But mere fact that all the three respondents collectively armed with weapons intercepted the injured and after challenging his act of giving information to police started inflicting blows infers common intention for commission of offence. It is true that while drawing panchnama of scene of offence, no blood marks were found but then we are armed with satisfactory explanation that round the clock many trucks are passing and repassing through that particular place. Similarly, P.W.5, Manoj, has also said about the frequency of persons and vehicles passing from that place. Panchnama Ex.17 itself says that while drawing Panchnama many wheel marks of trucks were seen. It cannot be gainsaid that even if blood marks were there movement of trucks would be sufficient to destroy this evidence and could not have been seen at the time when the Panchnama was drawn and, therefore, absence of blood marks cannot be fatal, adversely

affecting the prosecution case and thus we find that the evidence is creditworthy and reliable.

11. It is vehemently argued on behalf of the respondents that independent witnesses have not been examined and, therefore, prosecution case cannot be treated as credible and reliable. Question of examination of independent witness arises only if possibility of independent witness was existing. This contention does not find favour with this court on two reasons; (i) that P.W.3, Krishnaben, who is a neighbour of injured has been examined in this case. Merely because the witness is neighbour her evidence cannot be branded as interested and related and, therefore, not less than an independent witness. Secondly, it is not in dispute that the place of occurrence is separated with the locality by a compound wall of 5 ft. height as is clear from evidence of P.W.6, Ex.25. He says that the height of the wall is about 5 ft. In ordinary course it would not be possible for the neighbours to witness the incident happening behind a 5 ft. high wall. It has also come on record through the evidence of P.W.3 that except them no other independent witness was present and, therefore, possibility of procuring independent witness does not arise. On the contrary, evidence is to the effect that some other persons arrived at the scene of offence only after the respondents ran away. There is no law that in all cases independent witnesses must be examined and in the absence thereof case of prosecution based on other witnesses shall not be accepted. It is true that when the witnesses are related or interested their evidence has to be tested with more care and caution in light of other evidence. As discussed above, the evidence of eye witnesses alongwith that of injured is otherwise reliable, trustworthy and credible and is in corroboration of each other is also consistent qua the occurrence of incident, therefore, in our view, does not require any further corroboration from independent witness. According to law of evidence, evidence should be qualitative and not quantitative. The evidence should be weighed and not counted. If a particular fact stands established by cogent and concrete evidence then no further evidence is required on that fact as would be multiplicity of evidence. Thus, we do not find any substance in this contention.

12. M/s. Patel and Mehta have also argued that some coal particles were found on the cloth and body of the injured and, therefore, possibility of falling on coal heap and getting injured cannot be ruled out. It is also contended that the eye witnesses were at a distance of

about 200 ft. and could not have heard scream and cry of injured and consequently the so-called eye witness could have never heard the cries for help and their evidence should not be accepted in its face value. Admittedly, in the surrounding area, heaps of coal are found. Naturally, coal dust would be also found. The movement of trucks is also established. So possibility of coal dust and particles mixing in atmosphere cannot be ruled out and may be instrumental for presence on body. Frequent movement of trucks would also give rise to the presence of coal particles in the atmosphere which would not remain in the atmosphere but would come down and settle. In these circumstances, the coal particles found in the atmosphere may settle on any object including human being. Therefore, presence of coal particles on the body or cloth of the injured cannot be a source for doubting the occurrence as alleged by prosecution. The incident occurred on 10.12.1982 i.e., in winter season. The time is about 7.40 P.M., in winter season which may not render it impossible to hear any cry or shout raised by the injured at a distance of 200 ft. and, therefore, on this count also the testimony of eye witnesses that they heard the cries and scream for help cannot be viewed with doubt.

13. As regards medical evidence, an attempt is made that the injuries described by eye witnesses are not corroborated by medical evidence. On this point, our attention is drawn to the observations made by the learned Judge in paras 14 and 15 of his judgment whereby the learned Judge has come to conclusion that the injured Umaji Sadashiv sustained bodily injuries as mentioned in medical certificate Ex.15. M/s. Patel and Mehta has not been able to point out any infirmity as to how and where the learned Judge has committed error in appreciation and, therefore, this contention also does not find any force. Thus, on over all consideration of evidence placed before us, we are of the view that the prosecution has successfully established involvement of respondents in commission of offence. The prosecution has also been successful in establishing use of weapons and respective part of respondents and, therefore, only one conclusion can be drawn that none else but the accused are the persons who attacked and assaulted injured Umaji Sadashiv at the time and place alleged by the prosecution and, therefore, there is no alternative but to reverse the finding of acquittal and hold the respondents guilty of commission of offence. In our view, the evidence on record is so crystal clear that no two views are ever possible. Since the evidence is concrete and cogent, reliable and trustworthy, we are of the view that

manifestly the learned Judge has come to erroneous conclusion. His conclusion is wholly unreasonable, unjust, perverse and is not in conformity with the rule of evidence as a result of which the finding deserves to be interfered.

14. On the strength of foregoing discussion, the respondents are found guilty of offence and, therefore, now question arises as to under which section the respondents can be held guilty. The respondents are charged for commission of offence under Sections 307, 326, 333 read with Section 34 of IPC. The injured himself has stated that at the relevant time and place he was not on duty and was to report for duty at or about 8 P.M. Thus, admittedly, the injured was not on duty when he was assaulted by the respondents. Consequently, charge under Section 333 cannot be sustained.

15. We find consistent evidence that the injured was attacked by respondent No.1 holding scythe with the blunt portion thereof. The injury sustained by blow with scythe was not on vital part of the body, i.e., on right arm and on the leg. The doctor has said that the injuries sustained on arms and legs are not sufficient to cause death in ordinary course of nature. In these circumstances, intention of causing death cannot be attributed more particularly when respondent No.1 had attacked the injured with the blunt portion of the scythe. Had the respondent No.1 attacked the injured with sharp portion on vital part of the body probably there could have been a case for inferring intention for causing injury with a view to cause death or attempt to cause death under Section 307 of the IPC.

16. The respondents have also been charged for commission of offence under Section 326 of IPC for voluntarily causing grievous hurt by dangerous weapon. Our attention is drawn to definition of 'grievous hurt' as defined in Section 320 of IPC. Injuries as described by medical expert are not one as described in this Section as there is neither emasculation or permanent privation of the sight of either eye or permanent privation of the hearing of either ear or privation of any member or joint or destruction or permanent impairing of the powers of any member or joint or permanent disfiguration of the head or face. The hospitalisation was in all for eight days; initially for 2 days from 10th to 12th December 1982 and thereafter for six days from 24th to 30th December 1982. Therefore, it cannot be said that the injured had received hurt which endangered life or which caused the sufferer severe bodily pain, or

unable to follow his ordinary pursuits for more than twenty days. In absence of this we are of the opinion that Section 326 will not apply. In light of injuries and the above observations, in our view, the case would fall under Section 325 of IPC and accordingly the respondents are held guilty for offence punishable under Section 325 of IPC.

17. Since the respondents are held guilty for the first time, they have been summoned to remain personally present before this court to make submissions on the question of sentence. At this stage we may say that respondent Nos.1 and 2 are personally present in court and they have been heard on the point of sentence. In addition thereto they have also filed affidavits wherein they have stated that their parents are very old, they are the only bread earner in the family and as law abiding citizens are carrying on independent business without indulging in any illegal activities and, therefore, have prayed for taking a liberal view while awarding sentence. Notice was also issued against respondent No.3 to remain present and make submissions on the point of sentence. Despite rigorous efforts, the notice could not be served. One Mr. Laxmansinh Raising Pagi, Head Constable, Dabhoi Railway Police Station, who went for service of notice on respondent No.3 has filed affidavit dated 29.2.1996 stating that respondent No.3 is not found nor his whereabouts are known and on inquiry in the locality, also it is revealed that he is not heard since last ten years. Despite this affidavit, the investigating agency was also directed to make further inquiry about respondent No.3. The investigating agency has also recorded statement of some persons residing in the same locality where the respondent No.3 last resided. From the statements it is evident that whereabouts of respondent No.3 are not known since last more than a decade and despite several efforts notice could not be served. It is true that before condemning any person, he has to be heard on the point of sentence. But if despite rigorous search and various efforts presence cannot be secured, submissions made on his behalf by advocate on record, may be as appointed by court, can be looked into in compliance of the provisions. In this case, there are three respondents/ accused. The order holding them guilty has already been pronounced. Two of them are present personally in court and, therefore, simply because respondent No.3 is not traceable the final pronouncement against two of the accused who are present in court cannot be withheld for indefinite period, that is, till other respondent/accused is traced. In view of this fact and in the light of circumstances, we hold that

there will not be any illegality if the order of conviction is pronounced in absence of respondent No.3 upon hearing the advocate representing him.

18. We have given our conscious thought to the submissions made by the respondents who are present personally in court and their advocates and Mr. Mehta, who is representing respondent No.3. The record shows that respondents Nos.1 and 2 remained in custody as undertrial prisoners for a period of five days and respondent No.3 has remained in custody for a period of 45 days. Section 325 of IPC provides for imprisonment which may extend 7 years and, therefore, in ordinary course the period of sentence undergone as undertrial prisoners will not be sufficient. However, keeping in mind the fact that the incident occurred before more than 13 years and since then the respondents are on bail all through out, in our view, these are mitigating circumstances for taking liberal view and not awarding sentence on higher side. Hence, instead of imposing sentence for imprisonment, if fine is imposed, on higher side, ends of justice would be served. On this point our attention is also drawn to the decision of the Supreme Court in the case of State of Karnataka v. Ganapathy, 1994 SCC (Cri) 1165, wherein since the accused was on bail for about more than 12 years keeping in mind the present trend in the field of penology the sentence of two years awarded by the trial court was reduced to fine of Rs.2000/- and same was ordered to be paid to the prosecutrix by way of compensation for the injuries sustained by her.

19. In the result, the appeal is allowed. The judgment and order of the learned trial Judge is set aside. The respondents/ accused are held guilty of offence under Section 325 of IPC and each of the accused/respondent is sentenced to undergo rigorous imprisonment for the period undergone during trial. Each of the accused/ respondent is also sentenced to pay fine of Rs.4,000/-, in default, to undergo simple imprisonment for one month. Out of the amount of fine, an amount of Rs.5,000/- is ordered to be paid to the injured complainant- Umaji Sadashiv, as compensation. The amount of fine being deposited by respondents/ accused, the Registrar is directed to inform the learned Sessions Judge, Baroda, to take appropriate steps for realisation, the amount of fine imposed, from respondents and in default to issue warrant for arrest and send to jail to serve our sentence. Office to accept amount of fine today only. Writ be sent to lower court. The amount of compensation to be paid to the victim irrespective of

non-payment by one of them.